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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

IN VACATION

KYLE JONES,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

On Certiorari to the United States
Court of Appeals For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Arthur T Ciccarello
John A. Rollins
Brickford Y. Brown
LEWIS, CICCARELLO,
MASINTER & FRIEDBERG
P. O. Box 1746
Charleston, West
Virginia 25326
(304) 343-8891
COUNSEL FOR PETITIONER

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KYLE JONES,

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V.

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RESPONDENT

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QUESTIONS PRESENTED

Did the Court of Appeals err in upholding Petitioner's conviction upon finding that under 30 U.S.C. 820, "knowing" rather than "willful" conduct is the requisite standard of criminal intent for a mine supervisor for a

corporate operator of a coal mine, who is charged with a violation of work place safety standards?

Did the Court of Appeals err in upholding the constitutionality of the statute's provisions for criminal prosecution of individual supervisors of corporately held coal mines and not for individual supervisors of mines held by individuals or partnerships, as satisfying equal protection guarantees?

PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were Petitioner and Gary Neil as appellants and the United States of America as appellee. The

foregoing parties are the same as those before the United States District Court for the Southern District of West Virginia, the court of original jurisdiction.

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OPINION BELOW

The opinion of the Court of Appeals below (Appendix, infra, p. 55) is reported in 735 F.2d 785. No written opinion was rendered by the District Court below.

JURISDICTION

The judgment on the Court of Appeals below was entered on June 1, 1984. Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc was filed on June 11, 1984, and the Order of the Court of Appeals below denying the same was entered July 11, 1984. (App. 99). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes which this case involves are the Fifth Amendment to the United States Constitution and 30 U.S.C. §§ 802 (d), (e), (f), 820, 868(m) and 863(f). Due to the length of the text of the applicable statutes, they are set forth verbatim in the Appendix at p. 101.

STATEMENT OF THE CASE

On December 21, 1982, Petitioner Kyle Jones was indicted in the United States District Court for the Southern District of West Virginia for criminal violations of work place safety standards of the Federal Mine Safety and Health Act of 1977. This rare application of the criminal provisions of the Act followed a November, 1980,

underground explosion that killed five miners in a coal mining complex owned and operated by Westmoreland Coal Company. Petitioner was an employee of Westmoreland and chief administrator (mine manager) of the West Virginia mine complex.

Indicted at the same time as Petitioner were Westmoreland Coal Company, the head of the underground mining operations (the general mine foreman) and three supervisors of the shifts of the several hundred miners employed at the mine. Under the indictments, each of the defendants were charged with various "willful" violations of mine safety standards alleged to have occurred at the time of the explosion or in the months that preceded it.

The charges were brought under 30 U.S.C. § 820 which provides for civil penalties for violations of mine safety standards by coal mine operators and criminal fines and imprisonment for "willful" violations. Under subsections 820(c) and (d), supervisory agents of a corporate operator, that is those who control all or part of a mine for the operator, are also liable for the same penalties as the operator, if they "knowingly authorized, ordered or carried out" the corporate violation of a statutory safety standard. These safety standards concern work place critera for underground mine ventilation, roof support, electrical equipment and hazard inspection, and are referred to by the Act as mandatory safety and health standards.

All of the indicted supervisors and Westmoreland entered into plea bargain agreements with the Government, except Petitioner and Gary Neil, the supervisor of the shift on which the explosion occurred. They were jointly indicted and tried under a fourteen count indictment. All fourteen counts of the indictment involved allegations against Petitioner with Neil being jointly charged on four of those counts.

In April, 1983, Petitioner and Neil were tried on all counts of the indictment. Based upon the evidence at trial, the District Court directed a verdict of acquittal for Petitioner on seven of the counts, including all four of the counts on which Neil was charged. Of the remaining seven counts submitted to the jury, Petitioner was

convicted of three counts and acquitted by the jury of the remaining four.[1] Neil was acquitted on two counts and convicted on the remaining two.

The Government's theory of the evidence at trial on all of the charges was not that Petitioner affirmatively ordered or authorized any actions in violation of the law or that he personally carried out the violations. Rather, the Government's theory was that Petitioner "authorized" the violations within the meaning of 30 U.S.C. § 820(c) by his acquiesence or omission to make certain that other supervisors and coal miners complied

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[1] Petitioner was sentenced to a term of imprisonment of three years, which was suspended except 30 days, a $5,000 fine and 250 days of public service work.

with the safety standards when he knew or should have known they were committing violations. In the case of each of the charges, Petitioner was alleged to have either "willfully" committed the violations, aided and abetted by the general mine foreman, or conversely, that he aided and abetted the general mine foreman in the violations.

These allegations must be viewed in light of the large size of the mine complex which necessitated many supervisory agents with differing responsibilities. The mine complex itself consisted of a large underground mine, coal preparation facilities, warehouses, shops, employee facilities and offices. Petitioner was in charge of the entire complex with the general

mine foreman as his immediate subordinate in charge of the underground mining activities and safety inspections. In turn there were also supervisors for each of the mine's three shifts who directed the various foreman responsible for supervising the crews of working miners.

One of the counts of indictment upon which Petitioner was convicted, alleged that Petitioner "willfully caused" the unauthorized, underground movement of a high voltage power center in violation of 30 U.S.C. § 868(m). (App. 108). This statutory provision prevents movement of the power centers, which are used to provide electricity to pieces of mining machinery, without either deenergizing them or obtaining a permit for their movement while

energized.

The facts surrounding this charge were not related to the mine explosion which occurred several months thereafter. Instead, it concerned the isolated movement of a power center from an inactive portion of the mine by a crew of miners. Petitioner had requested the general mine foreman to move all of the equipment in a portion of the mine, but had not specified how any of the equipment was to be moved.

The Government relied upon evidence that Petitioner made one inspection visit to the area of the mine where the equipment was being moved. During this visit the equipment was not being moved, but Government witnesses contended that Petitioner would have been be able to determine from the

configuration of the equipment that unauthorized movement had either taken place or would take place in the future. As Petitioner did not caution the miners or otherwise take steps to stop any future activities in the movement of the equipment, it was contended that his inaction constituted a "willful" criminal omission.

The other two counts of the indictment involved the provisions of 30 U.S.C. § 868(f) which requires weekly examinations for hazardous mine conditions be made by certified persons designated by the mine operator. One of these counts alleged that during the six month period preceding the explosion, Petitioner "willfully violated" the standard by "willfully causing" persons to make inadequate

examinations for hazardous conditions by "allowing, permitting and condoning" their actions in making incomplete examinations. (App. 112).

The evidence at trial concerning inadequate weekly examinations of the mine established that the entire mine was to be examined by certified foremen of mining crews who were designated each week by the general mine foreman. Some of these foremen testified that due to the limited time available to them and the many miles of underground tunnels, they were unable to walk the mine passageways in their entirety, as required by law. They had complained of this fact to the general mine foreman and in some cases to Petitioner himself. The general mine foreman testified that he and Petitioner had

discussed the need for more supervisory personnel at the mine, but neither had the authority to hire such persons. Requests for additional personnel were made to their superiors at Westmoreland, without success. Likewise, this omission was said to constitute a willful criminal violation.

The final count alleged that during one week period in the month before the explosion, Petitioner "willfully violated" the weekly examination standard in that he did "willfully fail" to cause a certified person to make any test for that week. (App. 110). Records of all weekly examinations and other tests at the mine, required by law, were kept in record books designated for that purpose. When an area of the mine was

examined by the designated foreman, he would enter the fact of his examination and its results in the record book.

The evidence relied upon for this count was that there was no such entry in the record books for one area of the mine for the particular week. The absence of the entry, along with evidence that normally entries were made for the examinations, was the basis of the conclusion that no such examination was made for the week. Further evidence that from time to time Petitioner would review these record books was such that the Government contended that Petitioner must have willfully omitted to cause the general mine foreman or others to, cause a foreman to make an examination for this week.

Petitioner did not take the stand

in his defense at trial, but stood upon the proposition that the evidence was wholly insufficient to establish "willful" or even "knowing" violations of the Act or that he had the particular duty to cause the acts, the omission of which, was complained to be in violation of the Act.

His defense is to be contrasted with that of his co-defendant Neil who had a more direct responsibility for performance of the tests involved in the charges against him. Neil contended not only that he did not have the requisite criminal intent, but testified he did not know the omitted tests were required under law.

Upon the conclusion of the evidence in the case, Petitioner requested the Court to charge the jury that it must

find that Petitioner "willfully" committed the act or omission charged and that willful conduct be defined as an act:[2]

> [d]one voluntarily, knowingly and purposely by a person who, having a free will or choice, intentionally disobeys the standards of law. Under the Federal Coal Mine, Health and Safety Act, a willful violation that may subject one to criminal penalties and prosecution, contemplates an affirmative act of commission or omission, and not merely the careless or negligent omission of a duty.

While the trial court accepted the Government's and defendants' position that willful was the applicable standard of intent for the crimes charged, it rejected the tendered instructions and charged the jury as follows:

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[2] Co-Defendant Neil offered a similar instruction.

> A violation of safety standards is done 'willfully' if it is done knowingly, purposely, and voluntarily either in intentional disobedience of the standard or in reckless disregard of its requirements.
>
> 'Reckless disregard' means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation.
>
> The term willfully requires an affirmative act either of commission or omission, not merely the careless omission of a duty.

After Petitioner's conviction and the District Court's denial of his post-trial motions for new trial, directed verdict of acquittal and arrest of judgment, Petitioner and Neil took separate appeals which were consolidated for briefing and argument

by the Court of Appeals below. The issues raised on appeal concerned: 1) the verdict was not supported by substantial evidence of willful conduct; 2) the charge to the jury was erroneous and defined a standard of intent less than willful by its incorporated definition of reckless disregard; and 3) the Federal Mine Safety and Health Act is violative of equal protection standards and the necessary certainty for criminal statutes.[3] The Court of Appeals rejected all of Petitioners' contentions noting concern only

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[3] Petitioner specifically raised the constitutional issues on the district court level in a pre-trial motion to dismiss the Indictment and in his motions for New Trial, Judgement NOV and Arrest of Judgment.

on the sufficiency of the evidence, which doubt was resolved in favor of the Government.

Petitioner seeks a review on certiorari of the Court of Appeals decision of the Court of Appeals, contrary to the position of the Government, Petitioner and Neil on appeal, that 30 U.S.C. 820 established a "knowing" rather than a "willful" standard of intent for violations of mandatory safety standards. This determination necessary effected the issues of the validity of the District Court's charge to the jury and the sufficiency of the evidence. The Petitioner also finds that the Act is unconstitutional under equal protection analysis.

Co-defendant Neil has also filed a

petition for certiorari under Rule 46, which is presently pending before this Court.

ARGUMENT FOR ALLOWANCE OF WRIT

1. The Court of Appeals below in holding that the standard of criminal intent for a violation of an agent under 30 U.S.C. § 820 is a "knowing" rather than a "willful" standard, erroneously decided an important question of federal law which has not been, but should be settled by this Court.

The decision of the Court of Appeals contains a fundamental and unprecedented interpretation of the criminal provisions of the Act, 30 U.S.C. § 820(d). This interpretation

was stated by the Court of Appeals as follows:

> . . . [C]ongress established a strict liability standard to assess civil liability and a willful standard to fix criminal liability against operators. An agent of a corporate operator who 'knowingly authorized, ordered, or carried out' a violation was subject to civil and criminal penalties. Therefore, Congress mandated a knowing standard to assess both civil and criminal liability against corporate agents. (App. 64). (emphasis added)

It is the position of Petitioner that a review of the Act and applicable law compels the finding that a willful rather than a knowing standard of intent is necessary for the criminal prosecution of supervisory agents of corporate coal mine operators. This same conclusion was reached by the

District Court, and by the United States, Petitioner and co-defendant Neil to extent that issue of the applicable intent was not separately addressed by any of the parties in their briefs before the Court of Appeals.

In this determination, it is necessary to consider the importance of the Court's finding of a knowing standard. It is a universal proposition of law that a willful standard of criminal intent declares a higher, more culpable intent than "knowing". Eg. United Stated v. Mekjian 505 F.2d 1320 (5th Cir. 1975); St. Louis & S.F.R.R. v. United States, 169 F. 69 (8th Cir. 1909). Assuming this basic proposition of law, the Court of Appeals decision

means not only that there is no distinction between the type of conduct that would subject an agent of a corporate operator to civil penalties, as opposed to criminal penalties, for violations of the Act, but that a higher standard of criminal intent is necessary for a violation by a corporation than the standard for its supervisory agents.

This interpretation is illuminated by a consideration of the specific language of the Act. Subsection 820 (c) provides that agents of corporate coal mine operators who "knowingly" authorize, order or carry out a violation of a safety standard of the Act are subject to the "same civil penalties, fines and imprisonment that may be imposed upon a person under

subsections (a) and (d)" of section 820. When one reviews subsections (a) and (d), it is determined that subsection (a) is a provision for strict civil liability for the operator and the imposition of civil penalties. Subsection (d) contains the penalties for fine and imprisonment for "any operator who willfully violates a mandatory health or safety standard" of the Act. It would seem from a simple reading of the Act that the referencing of subsection (c) to subsection (d) would mean that a supervisory agent of a corporate operator must also act "willfully" to be subject to such criminal penalties, while his acting only "knowingly" would subject him to civil penalties.

Notwithstanding such a conclusion, the Court of Appeals determined that both civil and criminal violations of the Act result upon "knowing" conduct of a corporate agent. This would seem to include the assumption that Congress intended a lesser standard of criminal intent for corporate agents than for their corporate master. However, a review of the House Committee Report on the Act reveals a contrary conclusion when it states:

> The committee recognizes, however, the awkward situation of the agent with respect to the act and his supervisor, the corporate operator, and his position somewhere between the two. The committee chose to qualify the agent as one who could be penalized and punished for violations, because it did want to break the chain of responsibility for such violations after penetrating the corporate

> shield. The committee does not, however, intend that the agent should bear the brunt of corporate violations. It is presumed that the agent is often acting with higher authority when he chooses to violate a mandatory health and safety standard or any other provision of the Act, or worse, when he knowingly violates or fails or refuses to comply with an imminent danger withdraw order of any final decision on any other order. H. R. Rep. No. 91-563, reprinted in 1969 U.S. Code Cong. & Ad. News 2503, 2514. (emphasis supplied)

This report reflects that Congress did not intend supervisory corporate agents to receive more stringent treatment than the corporate operator.

The reflections of the congressional committee have more relevance when viewed in the coal mine setting which the Act regulates. A coal mine is owned and operated by a

corporate operator who hires or contracts with supervisors to act as its agents in the regulation and conduct of the work of the mine and the coal miners. If a safety standard is violated at a mine, the corporation is strictly liable under the Act for civil penalties. Likewise the supervisors or other agents of the corporation who ordered or authorized the violation are also civily liable if they "knowingly" acted or omitted to act in connection with the violation.

The question then becomes when is this violation one that may be subject to criminal prosection. As a mere legal entity, a corporation cannot in and of itself have any willful intent except by the intent of its directors,

officers and agents. In the example indicated, if one or more of the supervisory agents acted in a willful manner, then in turn the corporation would be subject to criminal prosecution along with those agents who so acted.

The necessity for the foregoing conclusion is more apparent when the interpretation of the Court of Appeals is applied to the above example when a supervisory agent willfully orders a violation of the Act. In a joint prosecution of the corporation and the agent or agents, the jury would be asked to determine the criminal liability of the corporation upon whether it acted "willfully", based upon the conduct and intent of its corporate officers or agents. On the

other hand, in the same trial the jury would be asked if the officers or agents merely acted "knowingly" to determine their criminal liability. This position is irreconcilable given the necessity of the corporation to derive its intent from its officers and agents.

Such a situation was exactly the one presented in the only other published opinion ever to deal with the subject at issue, the Sixth Circuit opinion of United States v. Consolidation Coal Co., 504 F.3d 1330 (6th Cir. 1974). It is this decision upon which the Court of Appeals relied for the proposition that there is support for a finding of different standards of criminal intent for corporate operators as opposed to

their supervisory agents. This reliance is difficult to understand when one considers that the court in Consolidation Coal specifically reversed the criminal conviction of the corporate operator and directed a verdict of acquittal for a supervisory agent by reaching the opposite conclusion of the court in this case. The Sixth Circuit stated:

> Since congress provided both a civil penalty and a criminal liability for violations of mine safety standards, it considered that such violations could have very serious results. Consequently there should be a very clear distinction between the type of violation that would incur only a civil penalty and one that would rise to criminal liability. Obviously, it was not intended that such a violation as would give rise to a civil penalty should be alternatively a criminal offense. The statute used the term 'willfully violates.' We are of the

> opinion that this would contemplate an affirmative act either of commission or omission, not merely the careless omission of a duty.
>
> The instruction on willfullness as given was not a sufficiently clear definition of the crime contemplated by the statute.
>
> We conclude that the court erred in its instruction of willfullness. In this instruction, the court used the word 'knowingly' in the disjunctive. The jury could conclude from this that 'knowingly' was the same as 'willfully.' It has been held that 'willfully' means something more than 'knowingly' . . . . 504 F.2d at pp. 1334-1335. (emphasis supplied).

The Consolidation Coal court recognized that Congress did not intend for a corporate operator to be subject alternatively to civil or criminal prosecution for the same conduct by the mere choice of the prosecuting authorities. How is this concept any

different for the agent of the corporate operator? It should be remembered that Consolidation Coal did not deal with the issue of the necessary criminal intent for the corporate agent in that case. It did not reach the question of whether there was a knowing or willful standard under the Act for an agent, as it determined that the evidence at trial was insufficient to reach either knowing or willful conduct by the agent.

The interpretation by the Court of Appeals providing for the distinction of a higher standard of intent for operators than for agents of corporate operators is also contrary to the rule of statutory construction that a statute is to be construed in favor of its constitutionality. Eg. St. Martin

Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981). Here, the discrimination resulting from the Court of Appeals' interpretation is certainly violative of the equal protection guarantees of the Fifth Amendment to the United States Constitution.

Such a constitutional argument was in fact presented to the Court of Appeals as an alternative argument to that set forth later in this petition. In response to that argument, the Court of Appeals dismissed it as academic upon the notion that although the Government could have indicted Petitioner under a knowing standard, it in fact used a willful standard. It further concluded that Congress may have even intended to punish agents

more readily than an "impersonal corporate entity".

It is submitted that such an argument not only fails as a defense to the constitutional infirmity, but is wholly inconsistent with the Court of Appeals' finding that the charge of the jury was sufficient under a knowing standard. The argument seems curious to the extent that it relies upon the proposition that the wording of an indictment of a grand jury may cure an otherwise defective statute. Petitioner is unaware of any authority for such a proposition.

It likewise seems tenuous to attempt a justification of the discrimination by arguing that Congress sought to make individual agents more responsible than impersonal

corporations. The Act's definitions of "operator" and "agent" include both individuals and corporations. Therefore, individual operators as well as impersonal corporate operators have the same benefit of the higher standard of intent than that for individual or corporate agents of such operators. Consequently, it is obvious that the Court of Appeals' interpretation creates a doubt upon constitutionality of the Act and the ambiguity should be resolved in favor of an interpretation of a willful standard.

Such a finding is further compelled by another rule of construction that ambiguity in criminal or penal statutes must be resolved in favor of the defendant. Eg. Adamo Wreck & Co. v. United States, 434 U.S. 275 (1978).

While Petitioner finds the interpretation, that willful is the necessary standard of intent under the Act compelling, the very least that can said is that the statute is ambiguous. Given this ambiguity, the rule of lenity in resolving such questions would require a finding that the higher, willful standard of intent be applied to all criminal prosecutions under the Act whether of agents, operators, individuals or corporations.

The effect of the Court of Appeals failing to find a willful standard had a significant impact on Petitioner's objection to the charge of the jury below. Petitioner has contended that the willful definition charge was such as to convey a meaning of less than

willful. The Court of Appeals resolved this argument by its conclusion that the Act only required a knowing standard of intent and stated, "We believe that the standard applied by the court, though couched in terms of willful conduct, set a level of behavior at least as culpable as that required to convict for knowing conduct in violation of the Act." (App. 70).

All of these considerations must be put in some perspective when one considers the uniqueness of the Federal Mine Safety and Health Act. Petitioner is unaware of any other state or congressional enactment that criminally punishes persons other than employers for violations of work place safety standards. The only other statute which is somewhat parallel to the Act

is the Occupational Health and Safety Act, 29 U.S.C. § 666 ("OSHA"). While the OSHA statute also provides for criminal prosecution for willful violations of work place safety standards, it only provides for prosecution of the employer, whether it be an individual or corporation, when the violation causes death to an employee. It does not apply, as does the Act herein, to supervisory agents of the employer, whether or not there is death or even injury of an employee.

This unique Act and the issue of the applicable standard of intent is of paramount interest to mining industry. The opinion of the Circuit Court of Appeals is the only opinion known to Petitioner that establishes this

crucial standard. The individual foremen, mine supervisors and other personnel defined as agents under the Act deserve a review of that opinion by this Court.

2. The Court of Appeals below in upholding the constitutionality of the statutes provisions for criminal prosecution of supervisors of corporately held coal mines and not for individual supervisors of mines held by individuals or partnerships, erroneously decided an important question of federal constutional law which has not been, but should be settled by this court.

The criminal and civil penalties of 30 U.S.C. § 820 apply to all individuals, partnerships, associations and corporations that are operators of a

coal mine. Section 820(c) extends these penalties to officers, directors and agents of corporate operators, who order, authorize or carry out a corporate violation of the safety standards of the Act. No such civil or criminal liabilities are imposed by the Act upon the agents of noncorporate operators and as such, violate the equal protection guarantees applied to the United States under the Fifth Amendment to the United States Constitution.

The Court of Appeals upheld this inequality of the Act based upon the rationale set forth in Richardson v. Secretary of Labor, 689 F.2d 632 (6th Cir. 1982), cert. denied, 103 S. Ct. 2088 (1983). Richardson was a civil case which invoked the civil penalties

of Section 820. Its rationale was quoted by the Court of Appeals below:,

> In a noncorporate structure, the sole proprietor or partners are personally liable as 'operators' for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do not violate mandatory health or safety standards than does the corporate operators. Subsection 819(c) [now 820(c)] attempts to correct this imbalance by giving the corporate employee a direct incentive to comply with the Act. (citation omitted). 689 F.2d at p. 633.

The illogical nature of this rationale, particularly in its application to a criminal case, is apparent upon closer examination. In a criminal prosecution, there is no

distinction between the effect of penalties upon a corporate operator as opposed to a noncorporate operator. If an agent of an operator violates a mandatory safety standard, then the operator, whether it be a corporation, sole proprietor or partner is liable for the violation. Counsel is not aware of how any operator, regardless of its organizational structure, can "pass off" criminal penalties in its taxes or otherwise, as a cost of doing business. On the other hand, if penalties may be passed off in the sense of increased prices as an operational cost, then any operator has this option.

Obviously, any distinction between criminal penalties applicable to

agents of any operator is not directed to the operator so that it will require compliance by its agents and employees. The only reason to make an agent criminally liable is to make sure he acts in compliance with the mandatory safety standards, without the ability to resort to the defense that he was only acting for or on orders of his employer or principal. Again, this reason is equally applicable to agents of any operator.

In the case of officers and directors, there may be some support for a distinction providing for their liability, as their acts are arguably the collective decision, conscience or decision making of the corporate

entity. This is distinct from an individual agent who orders or authorizes a violation. An agent is specifically defined under the Act as "any person charged with responsibility for operation of all or part of a coal mine". 30 U.S.C. § 802(e). The agent is not made criminally liable by reason of his part in the decision making activity, but rather is one directly connected with the actual day to day operations of a coal mine. He is not in the same position as an officer or director who may be cloaked with corporate immunity.

Similarly, the assumption made by the Court of Appeals below and the Richardson Court that all non corporate mining operations are small

and that the decision makers are going to fit the statutory definition of a 'operator' is tenuous. Many sole proprietorships and partnerships engage in coal mining operations and employ supervisory personnel who are not 'operators'.

In the final analysis the Court of Appeals decision completely ignores the crucial question of any equal protection analysis. It views the question as whether the statute bears "some rational relationship to legitimate [Governmental] end". E.g. McGowan v. Maryland, 366 U.S. 420 (1961). The crux of the analysis is whether the classification or unequal treatment of the statute bears a relationship to the governmental end.

In urging various theories in support of the discrimination, the Court of Appeals correctly notes that making agents of corporate entitites responsible for noncompliance serves the purpose of the Act and bears a rational relationship to its goals, but it offers no reason for the differing treatment of agents employed by non corporate operators and those agents employed by a corporate operator.

In enacting the Federal Coal Mine Safety and Health Act Congress was very clear that the protections it intended to further applied to all miners whether they were employed by corporations, partnerships or sole proprietors.[5]

5 30 U.S.C. § 801(a) provides that,

Two agents, one employed by a corporate operator and the other employed by a non corporate operator, who both performed the same duties in two different coal mines, who both order, authorize or carry out the same violation and who have the same willful intent, do not have the same treatment. One is criminally liable for fine and imprisonment and the other is not. There is no rationale to make the one liable for criminal prosecution and to exempt the other for the same acts, by the mere

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Footnote 5 continued

> "the first priority and concern of all in the coal and other mining industry must be the health and safety of its most precious resource, the miner" and goes on in subsection (g) to state that it is the purpose of the Act to "require <u>each operator</u> of a coal or other mine and <u>every miner</u> in such mine comply with the safety standards of the Act.

fortuitous fact of the different organizational structure of their employers and principals.[6] Clearly the statute does not withstand even minimal scrutiny as the classification involved is both arbitrary and contrary to Congressional intent. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). This unequality should be addressed by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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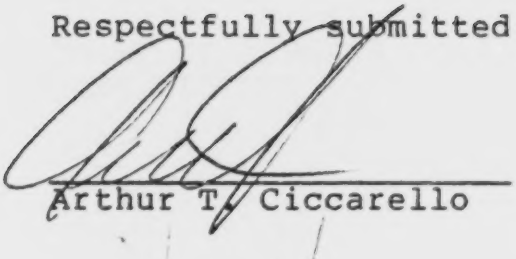
[6] Also see dissent of Enslen, District Judge in Richardson v. Secretary of Labor, 689 F.2d at p. 634.

Respectfully submitted:



Arthur T. Ciccarello

John A. Rollins,
Counsel for Petitioner

LEWIS, CICCARELLO, MASINTER & FRIEDBERG
Arthur T. Ciccarello
John A. Rollins
Brickford Y. Brown
6th Floor - L & S Building
812 Quarrier Street
P. O. Box 1746
Charleston, West Virginia 25326
(304) 343-8891
Counsel for Petitioner

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5181

UNITED STATES OF AMERICA,

Appellee,

v.

KYLE JONES,

Appellant.

No. 83-5182

UNITED STATES OF AMERICA,

Appellee,

v.

GARY NEIL,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia at Charleston. John T. Copenhaver, Jr., District Judge.
CR 82-20099

Argued: January 13, 1984
Decided: June 1, 1984

Before RUSSELL and ERVIN, Circuit Judges; and MAX ROSENN, Senior Circuit Judge for the United States Court of Appeals for the Third Circuit, sitting by designation.

James D. McQueen, Jr. (W. Nicholas Reynolds, Campbell, Woods, Bagley, Emerson, McNeer & Herndon on brief) for Appellant Gary Neil; John A. Rollins (Arthur T. Ciccarello, Brickford Y. Brown, Lewis, Ciccarello, Masinter & Friedberg on brief) for Appellant Kyle Jones; Michael W. Carey, Assistant United States Attorney (David A. Faber, United States Attorney, Marye L. Wright, Assistant United States Attorney on brief) for Appellee.

ROSENN, Senior Circuit Judge.

On November 7, 1980, an explosion at a coal mine operated by the Westmoreland Coal Company in Boone County, West Virginia killed five miners. Following an investigation,

Kyle Jones, the mine superintendent, and Gary Neil, the night shift supervisor, were indicted in the United States District Court for the Southern District of West Virginia. They were jointly tried to a jury and convicted of violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-960 (1982).[1]

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1. Jones and Neil were convicted under 30 U.S.C. § 820(c) (1982) as agents of corporate coal mine operators who "knowingly authorized, ordered, or carried out" violations of the safety standards. Jones was held criminally liable for his role in (1) the movement of a power center while energized, in violation of 30 U.S.C. § 868(m) (1982) (count II), (2) the failure to conduct adequate weekly examinations, in violation of 30 U.S.C. § 863(f) (1982) (count V), and (3) the failure to conduct a weekly examination of the 1 East and 2 South areas of the mine commencing the week of October 20, 1980, also in violation of 30 U.S.C. § 863(f) (1982) (count III). Neil was convicted for his role in causing miners to enter uninspected idle areas, in violation of 30 U.S.C. §

The defendants appeal their convictions. We affirm.

I. Background

In response to the serious dangers to workers' health and safety engendered by the recurring catastrophes in the nation's coal mines, Congress enacted the Federal Coal Mine Health and Safety Act of 1969 (CMHSA), Pub. L. No. 91-173, 83 Stat. 742 (codified as amended at 30 U.S.C. §§ 801-960 (1976)).[2] In so doing, Congress declared, inter alia, that "the first priority and concern of

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Footnote 1 continued.

863(m) (1982) (counts IX and XIII). They were acquitted on other related counts.

2. The immediate disaster that became the catalyst for the 1969 legislation was a mine explosion that killed 78 men at the Consolidation Coal Company's No. 9 mine at Farmington,

all in the coal or other mining industry must be the health and safety of its most precious resource -- the miner." 30 U.S.C. § 801 (1982). The CMHSA was broad in scope; it extended to virtually every coal mine in the United States and established rigorous health and safety standards. Several years later, Congress amended the CMHSA and redesignated it as the Federal Mine Safety and Health Act of 1977 (Act).

Section 863 of the Act provides for detailed safety and

Footnote 2 continued.

West Virginia, on November 20, 1968. Senate Comm. on Labor and Public Welfare, Sen. Rep. No. 411, 91st Cong., 1st Sess. 6 (1969), reprinted in Legislative History of the Federal Coal Mine Health and Safety Act of 1969 including Black Lung Amendments of 1972, at 132 (1975).

examination requirements for underground mines. Before miners enter the active workings of a coal mine for a work shift, a certified person must thoroughly examine every working section and test for accumulations of methane, a highly inflammable gas, and for oxygen deficiency. A similar examination must be performed at least once during each coal-producing shift. Within three hours prior to miners entering idle and abandoned areas of the mine, inspections must be made of these areas for oxygen deficiencies, methane, and other dangerous conditions. In addition, the Act requires weekly examinations of at least one entry of each main intake and return aircourse in its entirety. The examiner must record the results in a book open for inspection to interested

persons. The mine superintendent or the assistant superintendent must read and countersign the daily and weekly reports.

The evidence produced at trial revealed a variety of safety violations at the Ferrell No. 17 mine, the site of the explosion. Violations of the Act's examination requirements were commonplace.[3] Apparently, the practice in the mine was not to examine entryways in nonworking areas, even if miners were to travel in these idle areas.

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3. In addition to these defendants, other supervisors and the Westmoreland Coal Company were charged with various violations of the Federal Mine Safety and Health Act of 1977. Westmoreland Coal Company entered into a plea agreement to a thirteen count indictment and agreed to pay more than one million dollars in fines and contributions. The general mine foreman, the day shift supervisor, and the evening shift supervisor also pled guilty.

During the weekly examinations, foremen would ride a personnel carrier up a track entry, stop periodically at mandoors, and peer through them instead of examining the entire length of the aircourse as required by the Act. Foremen testified that they would falsely note in the book that they had made a proper examination, and stated that mine supervisors were aware of this practice. Another impropriety was the movement of a power center while in the mine in an energized state. Moving a power center while energized creates a serious danger of electrical shock.

At the time of the explosion, defendant Kyle Jones was the superintendent in charge of the mine. His immediate subordinates were a general mine foreman and three shift supervisors. Defendant Gary Neil was the

shift supervisor in charge when the explosion occurred.

On appeal, the defendants challenge their convictions on several grounds. They assert that an instruction to the jury allowed them to be convicted under a lesser standard of culpability than that mandated by the Act. The defendants also claim that there is insufficient evidence to support the guilty verdicts. Finally, they maintain that their convictions must be reversed because the Act is unconstitutional.

II. The Jury Instruction

In enacting the CMHSA in 1969, Congress recognized that strict civil and criminal penalties for violations were necessary to ensure that the health and safety standards were met. Congress also realized that it might be

unfair and ineffective to place sole responsibility for violation of the standards on either the operators of mines or on their agents who had personally authorized the violations. See H.R. Rep. No. 563, 91st Cong., 1st Sess., reprinted in 1969 U.S. Code Cong. & Ad. News 2503, 2513-14. Therefore, Congress expressly imposed civil and criminal penalties on both mine operators and agents of corporate mine operators.

Section 819 enumerated penalties and enforcement procedures for violations of the mandatory health or safety standards. An operator of a coal mine in which a violation occurred was subject to a civil penalty; an operator who "willfully" violated a standard was subject to a criminal penalty. Thus, Congress established a

strict liability standard to access civil liability and a willful standard to fix criminal liability against operators. An agent of a corporate operator who "knowingly authorized, ordered, or carried out" a violation was subject to civil and criminal penalties. Therefore, Congress mandated a knowing standard to assess both civil and criminal liability against corporate agents.[4]

When Congress amended the CMHSA in 1977, it sought to strengthen the statute by providing for better enforcement procedures. Although

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4. The Sixth Circuit recognized this distinction between the standards for operators and agents in United States v. Consolidation Coal Co., 504 F.2d 1330 (6th Cir. 1974). The court tested the operator's conviction under a willful standard and the agent's conviction under a knowing standard.

Congress redrafted the penalty section, it did not change the culpability standards. Section 820 of the Act currently provides for civil and criminal penalties for violations of the health and safety requirements.[5]

Under section 820(c) of the Act, the standard of culpability for a corporate agent is whether the agent

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5. 30 U.S.C. § 820 (1982) states in pertinent part:

> (c) Liability of corporate directors, officers, and agents
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> Whenever a corporate operator violates a mandatory health or safety standard. . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

"knowingly authorized, ordered, or carried out" a violation of the health or safety standards. The counts of the indictment on which the defendants Jones and Neil were convicted, however, charged that they "willfully" violated a mandatory safety standard. The court informed the jury that it may convict if the jury found that the defendants had acted "willfully". To gauge the adequacy of the instruction, we must determine whether it allowed the jury to convict the defendants under a lesser standard of culpability than that set forth in the Act.

Footnote 5 continued.

> (d) Criminal penalties
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> Any operator who willfully violates a mandatory health or safety standard . . . shall, upon conviction, be punished by a fine of not more

The court instructed the jury that "[a] violation of a safety standard is done willfully if it is done knowingly, purposely and voluntarily . . . and requires an affirmative act either of commission or omission, not merely the careless omission of a duty.[6] A well-accepted

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Footnote 5 continued.

than $25,000, or by imprisonment for not more than one year, or by both . . . .

6. At trial, the court instructed the jury:

> A violation of a safety standard is done willfully if it is done knowingly, purposely and voluntarily either in intentional disobedience of the standard or in reckless disregard of its requirements. Reckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should

definition of "knowingly" is "[a]n act . . . done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 14.04 (3d ed. 1977). The district court in this case specifically included references to voluntary and intentional conduct in its instruction, although it did not include the explanatory statement in the foregoing definition pertaining to "mistake or accident or other innocent reason." When, however, one looks at the complete instruction or willfulness, it is evident that

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Footnote 6 continued.

> have known and had reason to know at the time of the violation. The term willfully requires an affirmative act either of commission or

accidental, mistaken, or other innocent acts are excluded. We belive that the standard applied by the court, though couched in terms of willful conduct, set a level of behavior at least as culpable as that required to convict for knowing conduct in violation of the Act.

In United States v. Illinois Central Railroad, 303 U.S. 239 (1938), the Supreme Court described willful conduct as "that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize

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Footnote 6 continued.

> omission, not merely the careless omission of a duty.

This instruction was substantially similar to the one proposed by the Sixth Circuit in Consolidation Coal, supra.

'conduct marked by careless disregard whether or not one has the right so to act.'" Id. at 242-43 (quoting United States v. Murdock, 290 U.S. 389, 394 (1933)). The trial court here also included in its charge the statement that the defendants' violation must be "either in intentional disobedience of the [safety] standard or in reckless disregard of its requirements." This language conforms to the interpretation of willfulness provided by several of the circuits. In Consolidation Coal, supra, at 1335, the Sixth Circuit suggested an instruction almost identical to the one provided in the present case. This court, in interpreting OSHA regulations, has used similar language to categorize a willful violation. See Intercounty Construction Co. v. Occupational Safety

and Health Review Commission, 522 F.2d 777, 780 (4th Cir. 1975).[7]

The trial court in the case sub judice augmented the instruction by providing a definition of reckless disregard: "Reckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation." This well-accepted definition

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7. Other circuits also have adopted this definition. See e.g., Schonbek & Co., Inc. v. Donovan, 646 F.2d 799, 800 (2d Cir. 1981) (per curiam); Babcock & Wilcox Co. v. OSHRC, 622 F.2d 1160, 1167 (3rd Cir. 1980); National Steel & Shipbuilding Co. v. OSHRC, 607 F.2d 311, 313-16 (9th Cir. 1979); Georgia Elec. Co. v. Marshall, 595 F.2d 309, 318 (5th Cir. 1979); Kent Nowlin Constr. Co. v. OSHRC, 593 F.2d 368, 372 (10th Cir. 1979); Cedar Constr. Co. v. OSHRC, 587 F.2d 1303, § 13

adequately conveys the meaning of the term "reckless disregard." See, e.g., United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir. 1983).

The defendants further assert that the court's instruction allowed the jury to convict them without finding that they had knowledge of the safety standard. The defendants do not demonstrate, however, that such a finding is necessary to sustain their convictions. To convict, the prosecution must prove generally only that the defendant knowingly committed

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Footnote 7 continued.

05 (D.C. Cir. 1979) (per curiam); Empire-Detroit Steel Div. v. OSHRC, 579 F.2d 378, 384-85 (6th Cir. 1978); Western Waterproofing Co., Inc. v. Marshall, 576 F.2d 139, 143 (8th Cir.), cert. denied, 439 U.S. 965 (1978); F.X. Messina Constr. Corp. v. OSHRC, 505 F.2d 701, 702 (1st Cir. 1974).

the offensive act, not that the defendant knowingly violated the law. See United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563 (1971). See also United States v. Moore, 586 F.2d 1029, 1033 (4th Cir. 1978).

In United States v. International Minerals & Chemical Corp., supra, the Supreme Court interpreted a statute that provided for criminal penalties for whoever "knowingly violated any such (transportation of hazardous waste) regulation". Id. at 599. The Court "decline(d) to attribute to Congress the inaccurate view that that Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word 'knowingly.'" Id.

at 563. The Court also found "unwarranted the conclusion that Congress abandoned the general rule and required knowledge of both the facts and the pertinent law before a criminal conviction could be sustained under this Act." Id. At least in the area of inherently dangerous activities, once a person knowingly acts, the person may not escape criminal liability because of ignorance that the offensive conduct violates the law. "(W)here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." Id. at 565.

Nothing in the Act or its legislative history indicates congressional intent to deviate from the ordinary standard in criminal law that requires the prosecution to prove a knowing performance of a prohibited act rather than a knowing disobedience of the law. To convict, the jury did not need to find that the defendants knew the law's requirements. We conclude that the court did not err in its instruction to the jury.

III. Sufficiency of the Evidence

The defendants also assert that there was insufficient evidence to support their convictions. We have already alluded to the specific offenses for which the jury convicted the defendants and we will not reiterate them. See supra note 1. We must uphold the verdicts if there is

substantial evidence, viewed in the light most favorable to the Government, to support them. Burks v. United States, 437 U.S. 1, 17 (1978). See United States v. Steed, 674 F.2d 284, 286 (4th Cir. 1982) (en banc).

As superintendent of the mine, Jones was the on-site manager in charge of its overall operation. At trial, the Government produced ample evidence that Jones ordered the power center moved, and that it was moved while energized. (Count II). Jones strenuously contends that he did not knowingly authorize the movement of the power center in an energized state. Jones personally observed, however, the power center in the mine while it was stopped temporarily in transit. The Government introduced evidence from which the jury reasonably could have

concluded that when Jones saw the configuration of the power center and the moving equipment, it would have been impossible for him to conclude that the power center was being moved in other than an energized state. Further, two miners who were present at the scene testified that were they to stand in the area where Jones stood, it would be apparent to them that the power center was being moved in an energized condition. When he observed the power center, Jones did not order the machine deenergized or halt its transfer; instead, he encouraged the movement to continue at a more rapid rate. From this evidence, a jury reasonably could have concluded that Jones willfully caused the violation.

The Government also produced evidence that the required weekly

examinations of the mines were not being performed or were being performed significantly below the required standards. The Government asserted that Jones and the general mine foreman willfully caused superficial examinations rather than the careful ones mandated by the Act. (Count V). They allegedly permitted foremen to ride in personnel carriers up the track entries and to look through the mandoors instead of requiring them to examine the intake and return aircourse in is entirety. Further, the indictment charged Jones with "requiring those persons assigned to make the weekly examinations to perform many other duties which prevented them from adequately making the examination on the shift they were assigned . . . ."

At trial, section foremen testified to the illegal practices at the mine and stated that Jones knew about the improper examinations. There was also testimony that when he was told by one of the foremen that they did not have sufficient time to do the examinations, Jones casually dismissed the complaint with a statement that he (Jones) could do them "in four hours and sleep four hours." The evidence presented was sufficient to support a conclusion by the jury that Jones willfully caused the failure to conduct adequate weekly safety examinations at the mine.

The question of whether there was sufficient evidence to convict Jones of willfully causing a failure to conduct a weekly examination of the 1 East and 2 South areas of the mine

during the week commencing October 20 is more difficult. (Count III). We are troubled by the absence of direct evidence that there was no examination of this specific section of the mine during this particular week, or that Jones knew that none was performed. Our standard of review, however, is limited. United States v. Bice-Bey, 701 F.2d 1086, 1090 (4th Cir.), cert. denied, 104 S.Ct. 126 (1983). The Supreme Court has stated that an appellate court's reversal of a conviction on grounds of insufficient evidence should be "confined to cases where the prosecution's failure is clear." Burks v. United States, 437 U.S. 1, 17 (1978). This court has emphasized that "(t)he relevant question is not whether the appellate court is convinced of guilt beyond a

reasonable doubt, but rather whether, viewing the evidence in the light most favorable to the government, any rational trier of facts could have found the defendant guilty beyond a reasonable doubt." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). Further, "(w)e must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." Id.

At trial, the Government introduced the mine's examination book as an exhibit. Following an examination, the law requires that the examiner enter the observations in the safety book. The book showed that there was no record of a safety examination for the areas during the

period in question or during several previous weeks. There was testimony that if examinations were indeed performed they were recorded, as well as testimony that Jones reviewed the book as required by law. Upon consideration of the evidence presented, we conclude that a jury reasonably could have drawn the inferences necessary to find Jones guilty on this count beyond a reasonable doubt.

Neil, too, challenges the sufficiency of the evidence produced to convict him. As the night supervisor, Neil was in charge of the miner's work during his shift. Neil was convicted of willfully failing to have an inspection prior to causing miners to enter into idle areas of the mine. (Counts IX and XIII). His argument on

apeal is based primarily on the assertion that he was inexperienced and that the Government failed to prove that he knew that it was a violation of the law to send miners into the areas without causing a prior safety inspection. Neil testified that his recent promotion to night shift foreman raised serious questions in his mind about his ability to perform this important job without additional training. Indeed, the heart of his defense was that he was unaware of the safety regulations and ill-prepared for his position. The Government, however, was not required to prove that Neil knew the statutory safety requirements. It only needed to demonstrate that Neil had willfully caused miners to enter the areas when

there had not been a prior safety inspection.

Neil argues that to uphold the conviction the court would have to improperly construe the Act as a strict liability statute. This contention is incorrect. See United States v. International Minerals, supra, 402 U.S. at 560. If Neil mistakenly thought that when he authorized a task the miners would not be required to enter an idle area of the mine, he could not be convicted under the Act if for some unexpected reason they did so. Nor could he be convicted if he knew that they were entering an idle area of the mine, but he erroneously believed that the area had been inspected. The Act requires proof that Neil acted knowingly when he sent the men into an uninspected area. Although coal mining

is a hazardous industry, the Act imposes "strict liability" only to the extent that, when one acts in violation of a law, ignorance of the law is no excuse. We are persuaded that there was sufficient evidence presented to support Neil's conviction for willfully violating this mandatory safety standard.

IV. Constitutionality of the Act

The defendants challenge the constitutionality of the statute on several grounds. First, they assert that it violates the equal protection guarantee of the fifth amendment[8] by

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8. Because the defendants challenge federal rather than state action, they claim protection under the fifth amendment, not the fourteenth amendment. This distinction, however, is without significance in this case. "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."

holding liable agents of corporate operators but not punishing agents of noncorporate operators. The defendants concede that corporate agents do not constitute a suspect classification for equal protection analysis. The Act, therefore, must be upheld it if bears "some rational relationship to a legitimate (governmental) end." Clements v. Fashing, 457 U.S. 957, 963 (1982) (citing McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). See Richardson v. Secretary of Labor, 689 F.2d 632, 633 (6th Cir. 1982), cert. denied, 103 S.Ct. 2088 (1983).[9]

Footnote No. 8, continued.

Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam).

9. In a civil context, the court in Richardson, supra, upholding the constitutionality of the Act in the case subjudice, considered the issue of whether the Act discriminated against

Congress may have believed that in a noncorporate coal mining operation the threat of criminal sanctions against the operator personally would provide a sufficient incentive to comply with the mandatory safety standards. By contrast, in a corporate mining operation, those who are in control might well be insulated from criminal responsibility, the corporation being an impersonal legal entity. There is therefore a rational reason for imposing criminal sanctions

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Footnote No. 9 continued

> corporate agents and concluded that it did not. The court stated: In a noncorporate structure, the sole proprietor or partners are personally liable as "operators" for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do

upon the officers, directors, or agents who knowingly authorize, order, or carry out safety violations. It is they who are the decision-makers responsible for the commission of the unlawful acts of the corporate operators. See Richardson, supra, at 633.[10]

Footnote No. 9 continued

> not violate mandatory health or safety standards than does the corporate operator. Subsection 819(c) (now 820(c)) attempts to corrrect this imbalance by giving the corporate employee a direct incentive to comply with the Act. See Cowin & Co. v. Federal Mine Safety & Health Review Commission, 612 F.2d 838, 840 (4th Cir. 1979).

ID. at 633-34.

10. It may be that certain agents of noncorporate mining operators are also subject to criminal sanctions in light of the statutory definition of "operator" in section 802(d) of the Act. Under that definition, "operator" includes "any . . . other person who operates, controls or supervises a coal

In addition, the largest coal mines in the country tend to be owned and operated by corporate entities. In handling an issue, Congress "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical, Inc. 348 U.S. 483, 489 (1955). Congress may have believed that the problems at the corporate mines posed the gravest

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Footnote No. 10 continued

. . . mine." This language could be read to equate a supervising employee of a noncorporate owner with an "agent" as defined in section 802(e), which means "any person charged with responsibility for the operation of all or a part of a coal . . . mine." See Cowin & co., Inc. v. Fed. Mine Safety and Health Review Comm'n, 694 F.2d 966, 967-68 (4th Cir. 1982) (independent contractor held to be an "operator" under the Act); Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853, 861-63 (D.C. Cir. 1978) (the statutory term "operator" may

immediate threat to coal miners and decided to impose personal liability on agents at these mines. A noncorporate operator may not only have a greater incentive to ensure compliance but may also have a greater ability to do so because of the smaller size and generally less diffuse managerial authority of noncorporate operations.

The Supreme Court has recognized that under a "rational relationship" test, the "inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative test and an unavoidable one." Massachusetts Board of

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Footnote No. 10 continued

"agent" of a noncorporate operator could be subject to criminal prosecution under section 820(d).

Retirement vs. Murgia, 427 U.S. 307, 314 (1976) (per curiam). We cannot conclude that the decision by Congress include persons other than owners and lessees). Under this reasoning, an to hold corporate agents personally liable for violations of health and safety standards bears no rational relationship to a legitimate governmental interest. We therefore hold that the statutory distinction between corporate and noncorporate agents does not violate the equal protection guarantee.

The defendants also claim that the Act discriminates against agents of corporate operators and thereby violates the equal protection guarantee because "an agent of an operator could be convicted on a lesser standard of proof than that required to convict his

corporate empoyer." The basis of this assertion is that under section 820(c) agents are subject to prosecution for a knowing authorization or carrying out of a safety violation whereas operators under section 820(d) are held to a willful standard. In the circumstances we have here, however, this argument is academic and we need not explore it. Although the Government might have charged the defendants under the knowing standard of section 820(c), it deliberately chose to charge them under the willful standard of section 820(d). The defendants therefore cannot complain that they were subjected to a discriminatory standard. Furthermore, Congress might have decided that agents who personally commit a violation should be punished

more readily than an impersonal corporate entity.

Finally, the defendants argue that the statute is unconstitutionally vague. The statute subjects an agent to prosecution upon knowingly authorizing, ordering, or carrying out a violation of a mandatory safety standard. The defendants maintain that the Act impermissibly "leaves one uncertain as to whether a mere ommission (sic) to commply with the requirements of the Act is sufficient to establish criminal liability." They also claim that the statutory definition of the term "agent" as "any person charged with responsibility for the operation of all or a part of a coal . . . mine," 30 U.S.C. 802(e) (1982), improperly allows an operator to determine who may be liable under

the statute through the assignment of duties at the mine.

The Supreme Court has ruled that criminal statutes that are vague offend due process "because we assume that man is free to steer between lawful and unlawful conduct, (and) we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that we may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). See Hirschkop v. Snead, 594 F.2d 356, 370-71 (4th Cir. 1979) (en banc per curiam). The Federal Mine Safety and Health Act of 1977, however, provides "fair warning" to potential violators. The Supreme Court has held that one may act "knowingly and

willfully" by failing to perform a duty as well as by performing one. See Illinois Central Railroad, supra, 303 U.S. at 244. The statutory use of the term "knowingly" does not unconstitutionally fail to warn violators that they may be punished for acts of omission as well as of commission.

We also hold that the definition of the term "agent" is adequate. The Act punishes a person who, having responsibility for the operation of all or part of a mine, knowingly authorizes a violation of a safety standard. A person of ordinary intelligence should have no difficulty in understanding when he has responsibility for the operation of all or part of a coal mine. We reject the defendants' contention that the Act is

vague merely because a coal operator may choose which individuals shall have responsibility over parts of the mine. The possibility that exposure to criminal liability may depend upon the operational chain of responsibility does not create a constitutional infirmity.

V. Conclusion

Congress has chosen to legislate comprehensive health and safety standards for the coal mining industry and to impose civil and criminal penalties on violators. A person who is charged with the responsibility for the conduct of all or part of a coal mine is also charged under the Act with the responsibility for the health and safety of the miners who work under his supervision. It is vital that this person understand the

federal requirements. If he is not familiar with the substance of the safety standards, he not only imperils his subordinates but subjects himself to liability for civil and criminal penalties.

The jury determined that the defendants did not meet their responsibilities under the Act. After carefully reviewing the defendants' contentions, we perceive no reversible error. Accordingly, the convictions are affirmed.

[F I L E D
July 11, 1984
U.S. Court of Appeals
Fourth Circuit]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-5181

United States of America,

Appellee,

versus

Kyle Jones,

Appellant.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Russell, Judge Ervin, and Judge Rosenn.

For the Court,

JOHN M. GREACEN
Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are:

Fifth Amendment to Constitution of the United States which provides in relevant part, as follows:

> No person shall...be deprived of life, liberty or property, without due process of law...

The statutory provisions involved are:

30 U.S.C. 820, which provides, in relevant part, as follows:

> (a) Civil penalty for violation of mandatory health or safety standards
>
> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation.. Each

occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Civil penalty for failure to correct violation for which citation has been issued

Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $1,000 for each day during which such failure or violation continues.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil

penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator

. . .

30 U.S.C. § 802, which provides, in relevant part, as follows:

[(d)] "operator" means any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such time;

(e) "agent" means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine;

(f) "person" means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization;

(g) "miner" means any individual working in a coal or other mine.

30 U.S.C. § 863(f), which provides in relevant part as follows:

[(f)] In addition to the pre-shift and daily examinations required by this section, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas. Such weekly examination need not be made during any week in which the mine is idle for the entire week, except that such

examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 814(d) of this title, until such danger is abated. A record of these examinations, tests and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

30 U.S.C. 868(m), which provides, in relevant part, as follows:

(m) Power centers and portable transformers shall be deenergized before they are moved from one location to another, except that, when equipment powered by sources other than such centers or

transformers is not available, the Secretary may permit such centers and transformers to be moved while energized, if he determines that another equivalent or greater hazard may otherwise be created, and if they are moved under the supervision of a qualified person, and if such centers and transformers are examined prior to such movement by such person and found to be grounded by methods approved by an authorized representative of the Secretary and otherwise protected from hazards to the miner. A record shall be kept of such examinations. High-voltage cables, other than trailing cables, shall not be moved or handled at any time while energized, except that, when such centers and transformers are moved while energized as permitted under this subsection, energized high-voltage cables attached to such centers and transformers may be moved only by a qualified person and the operator of such mine shall require that such person wear approved and tested insulated wireman's gloves.

RELEVANT COUNTS OF THE INDICTMENT

COUNT I

A. At all times material hereto, Westmoreland Coal Company, a Delaware corporation, was engaged in the business of operating coal mines in West Virginia subject to the Federal Mine Safety and Health Act of 1977, Title 30, United States Code, Section 801 eq. seq. (hereinafter referred to as "The Mine Safety Act").

B. At all times material hereto, the Ferrell No. 17 mine (hereinafter referred to as "The Mine"), located near Uneeda, Boone County, West Virginia, and within the Southern District of West Virginia, was a coal mine, whose products affected commerce, operated by Westmoreland Coal Company and was subject to The Mine Safety Act.

C. At all times material hereto, defendant KYLE JONES was an agent and employee of the Westmoreland Coal Company, that is, the superindentent, also known as the mine manager, of The Mine.

Portions of Count One are stated as they are incorporated by reference in other counts.

COUNT TWO

A. Each allegation contained in paragraphs A, B and C of Count One hereof is realleged, reaffirmed and incorporated by reference hereto.

B. At all times material hereto, Title 30, United States Code, Section 868(m), a mandatory safety standard, was in effect and required in part that high voltage power centers and portable transformers shall be deenergized

before they are moved from one location to another in a mine, except with the permission of the Secretary of the United States Department of Labor or his authorized delegate.

C. That on or about September 3, 1980, near Uneeda, Boone County, West Virginia, and within the Southern District of West Virginia, defendant KYLE JONES willfully violated the mandatory safety standard set forth in paragraph B above, in fact, defendant KYLE JONES and other persons, whose identities are known to the Grand Jury, aided and abetted by each other, did willfully cause to be moved a power center while energized in the 2 South area of The Mine without the approval of the Secretary of Labor or his authorized delegate; in violation of

Title 30, United States Code, Section 820(c), 820(d) and 868(m) and Title 18, United States Code, Section 2.

COUNT THREE

A. Each allegation contained in paragraphs A, B and C of Count One herein is realleged, reaffirmed and incorporated by referenced hereto.

B. At all times material hereto, Title 30, United States Code, Section 863(f), a mandatory safety standard, with in effect and required in part the examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health and safety standards, shall be made at least once each week by a certified person in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main

return, in at least one entry of each intake and return air course in its entirety, and in idle workings.

C. That during the seven day period from approximately October 20, 1980, through approximately October 26, 1980, near Uneeda, Boone Cunty, West Virginia, and within the Southern District of West Virginia, defendant KYLE JONES willfully violated the mandatory safety standard set forth in paragraph B above, in that, defendant KYLE JONES and another person, whose identity is known to the Grand Jury, aided and abetted by each other, did willfully fail to cause a weekly examination for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, to be made by a

certified person of at least one entry of each intake and return air course in its entirety of The Mine, especially the 1 East and 2 South areas; in violation of Title 30, United States Code, Sections 820(c), 820(d) and 863(f) and Title 18, United States Code, Section 2.

COUNT FIVE

A. Each allegation contained in paragraphs A, B. and C of Count One and paragraph B of Count Three is realleged, reaffirmed and incorporated by reference hereto.

B. That from approximately June 23, 1980, through and including November 2, 1980, near Uneeda, Boone County, West Virginia and within the Southern District of West Virginia, defendant KYLE JONES willfully violated

the mandatory safety standard set forth in paragraph B of Count Three, in that, defendant KYLE JONES and another person, whose identity is known to the Grand Jury, aided and abetted by each other, did willfully cause persons known to the Grand Jury to make inadequate weekly examinations for hazardous conditions by allowing, permitting and condoning said persons to make said examinations by riding in personnel carriers and periodically stopping to look through mandoors rather than walking the intakes and returns in their entireties as required and further caused said examinations to be made in said fashion by requiring those persons assigned to make the weekly examinations to perform many other duties which prevented them from

adequately making the examination on the shift they were assigned; in violation of Title 30, United States Code, Sections 820(c), 820(d) and 863(f) and Title 18, United States Code, Section 2.